American Steel Works *and* Gerald W. Ford, Philip Comerford, and John E. Sumner, Jr. Cases 17-CA-8668, 17-CA-8707, and 17-CA-8825

August 31, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 15, 1979, Administrative Law Judge James L. Rose issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions, with comments; and the General Counsel filed a brief, with an appendix, in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order,[3] as modified herein.[4]

The Administrative Law Judge found, and we agree, that employee Ford was discharged in violation of Section 8(a)(4), (3), and (1), and that employee Sumner was discharged in violation of Section 8(a)(3) and (1).

Subsequent to the issuance of the Administrative Law Judge's Decision in this proceeding, the Board issued its decision in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), in which it set forth the test it will henceforth employ in dual-motive cases. Under the *Wright Line* test the General Counsel is required to make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. Although the Administrative Law Judge did not have the *Wright Line* test before him, he did make all the findings which are necessary to the application of that test.

As to the violation concerning Ford, the Administrative Law Judge concluded that Ford's protected activity was one of the reasons for his discharge. As to whether the discharge would have taken place even in the absence of the protected conduct, the Administrative Law Judge specifically found that "Ford would not have been discharged but for his prior protected activity including the filing of grievances and the filing of a charge with the Board and a complaint with OSHA." Thus, the Administrative Law Judge found that the discharge was improperly motivated, and that it was not established that the discharge would have occurred absent such improper motivation. In light of these findings, with which we are in full agreement, we conclude that under the test in *Wright Line, supra*, Respondent's discharge of Ford violated the Act as alleged in the complaint. Therefore, we adopt the Administrative Law Judge's finding that Respondent discharged Ford in violation of Section 8(a)(4), (3), and (1) of the Act.

As to the violation concerning Sumner, the Administrative Law Judge concluded that the ongoing union activity was a cause of Sumner's discharge, and that absent such activity Sumner would not have been discharged. Thus, the Administrative Law Judge found that Sumner's discharge was improperly motivated, and that Respondent did not establish that the discharge would have occurred absent such improper motivation. Again, in light of these findings with which we are in accord, we conclude that the violation alleged has been sustained. Therefore, we adopt the Administrative Law Judge's finding that Respondent discharged Sumner in violation of Section 8(a)(3) and (1) of the Act.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In the seventh and eighth paragraphs of sec. B,3, of his Decision, the Administrative Law Judge stated that employee Sumner attended the unemployment compensation hearing concerning employee Ford. While the record shows that a number of employees attended the hearing, there is nothing to indicate that Sumner was among them. However, Sumner's signature was the third one appearing on a document certifying that Ford had not influenced employees to participate in a wildcat strike. This document was received in evidence at that hearing and was shown to Respondent's representatives during that hearing.

[3] In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

[4] In par 1(d) of his recommended Order, the Administrative Law Judge uses the broad cease-and-desist language "in any other manner." However, we have considered this case in light of the standards set forth in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), and have concluded that a broad remedial order is inappropriate since it has not been shown that Respondent has a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. Accordingly, we shall modify the recommended Order by substituting the narrow injunctive language "in any like or related manner."

We shall further modify the recommended Order by incorporating therein a provision requiring Respondent to expunge from all its records and files any references to the unlawful discharges of employees Ford and Sumner and to the unlawful suspension of employee Comerford, and to notify said employees, in writing, that Respondent has taken such action and that evidence of the unlawful discharges or of the unlawful suspension will not be used as a basis for future personnel action against them.

Finally, we shall modify par. 2(a) of the recommended Order to include therein the appropriate reinstatement language.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, American Steel Works, Kansas City, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(d):

"(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Offer Gerald W. Ford and John E. Sumner, Jr., immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to other substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them and Philip Comerford whole for any losses they may have suffered as a result of the discrimination against them pursuant to the provisions set forth in the remedy section above."

3. Insert the following as paragraph 2(b) and reletter the following paragraphs accordingly:

"(b) Expunge from its records and files any and all references to the unlawful discharges of employees Ford and Sumner and to the unlawful suspension of employee Comerford, and notify said employees, in writing, that this has been done and that evidence of the unlawful discharges or of the unlawful suspension will not be used as a basis for future personnel action against them."

4. Substitute the attached Appendix A for that of the Administrative Law Judge.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties participated and were given the opportunity to call, examine, and cross-examine witnesses and to present evidence, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, in certain respects. We have been ordered to stop this activity, to post this notice, and to abide by its terms.

WE WILL NOT suspend, discharge, or otherwise discriminate against our employees because of their interest in, or activity on behalf of, United Steelworkers of America Local Union No. 1963 or any other labor organization.

WE WILL NOT suspend, discharge, or otherwise discriminate against our employees because they engage in concerted activity protected by Section 7 of the Act.

WE WILL NOT discharge or otherwise discriminate against our employees because they file charges with the National Labor Relations Board or any other agency.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Gerald W. Ford and John E. Sumner, Jr., immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them and Philip Comerford whole for any loss of wages or benefits they may have suffered as a result of the discrimination against them, with interest.

WE WILL expunge from our records and files any and all references to the unlawful discharges of employees Ford and Sumner and to the unlawful suspension of employee Comerford, and WE WILL notify these employees, in writing, that this has been done and that evidence of the unlawful discharges or of the unlawful suspension will not be used as a basis for future personnel action against them.

AMERICAN STEEL WORKS

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge: These consolidated cases were heard before me on April 3, 4, and 5, 1979, upon the General Cousel's complaints which alleged generally that on November 9, 1978,[1] the Respondent threatened employees in violation of Section 8(a)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*;[2] on December 14 suspended Philip Comerford, on December 20 discharged Gerald W. Ford, and on March 6 discharged John E. Sumner, Jr., all in violation of Section 8(a)(1) and (3) of the Act.

[1] All dates are in late 1978 or early 1979 unless otherwise indicated.

[2] The General Counsel argues in his brief that a threat was made to Philip Comerford on December 18 but this was not alleged in any of the complaints. While there is some evidence concerning this event, the matter was not fully litigated nor, in fact, has there been any motion to amend any of the complaints to include such an allegation. Accordingly, no finding or conclusion will be made concerning this contention.

In addition, the discharge of Ford is alleged to be violative of Section 8(a)(4).

The Respondent generally denies that it engaged in any unfair labor practices and affirmatively contends that it suspended Comerford and discharged Ford and Sumner for cause.

Upon the record as a whole,[3] including my observation of the witnesses, briefs, and arguments of counsel, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. JURISDICTION

The Respondent is a Missouri corporation engaged in the manufacture and nonretail sale of steel products at a facility located in Kansas City, Missouri. In the course and conduct of its business, the Respondent annually purchases directly from points outside the State of Missouri goods, products, and materials valued in excess of $50,000. The Respondent annually sells and delivers directly to points outside the State of Missouri products valued in excess of $50,000. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

United Steelworkers of America Local Union No. 1963 (herein called the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Facts*

For many years the Union has represented the Respondent's production employees. The Respondent and the Union have been parties to successive collective-bargaining agreements, the most recent of which was executed on October 12, 1978, effective from October 1, 1977, to October 1, 1980. During the material time here there were approximately 29 employees in the bargaining unit, all of whom, presumably, were members of the Union pursuant to the union-security clause.

The contract also contains a grievance and arbitration clause which outlines the manner in which disputes arising under the agreement shall be decided. This clause includes a no-strike pledge.

Gerald W. Ford came to work for the Respondent the second time in June 1978. In August he joined the Union and sometime in the early part of October he was appointed by Union President Benjamin Panuco to fill the remainder of the treasurer's term.

Thereafter, Ford was an officer of the Union, including service as a committeeman during the latter stages of contract negotiations and is a signatory to the contract. As with the other officers, Ford functioned as a union steward, the bargaining unit being too small to justify stewards in addition to the officers.

Shortly after becoming a union officer, Ford undertook to complain on behalf of fellow employees about a variety of matters involving such things as the lunchroom, excusable absences, and job assignments. These complaints were in the form of grievances, the first three of which are dated October 9, composed by Ford, and signed by him as well as by a number of other employees. These grievances received negative answers from Willard F. Grindley, the Company's vice president and principal officer in dealing with production employees.

On October 24 Ford filed another grievance which was answered by Grindley that day. In his answer, Grindley referred to an October 12 meeting at which Grindley had torn up one of Ford's grievances. And he added, "You mentioned on October 12, 1978 that you guessed you would terminate your employment with us if we so wished. Please advise when you can do so; this would surely be mutually beneficial and we offer formal invitation for you to leave, since it seems impossible to work with you in a reasonable manner."

On October 26 Ford filed a charge with the National Labor Relations Board alleging that since on or about October 9 the Respondent had failed to process grievances pursuant to the grievance and arbitration procedure of the collective-bargaining agreement.[4]

On November 7, Ford typed a grievance to be filed by employee Paul Cook. Cook presented the grievance to Shop Superintendent Joseph Korasac who refused to accept it on grounds that it had been typed by Ford and not written in longhand by Cook.

Also on November 7 Ford filed a grievance alleging that he was being forced to violate the contract by accepting an order to work out of his job classification. This grievance too was answered by Grindley with the characterization that it was not "a grievance."

On December 6 Ford filed a complaint with the Occupational Safety and Health Administration which resulted in an OSHA inspection on December 13. OSHA Inspectors Judy Bukowski and William Jackson arrived at the Respondent's plant around 9 a.m. and served the complaint on Grindley.

During this initial meeting, Grindley, noting that the complaint had been signed by Ford, said, "he is a troublemaker" pointing to a stack of papers on his desk.

Preparatory to the inspection, Jackson asked Grindley if they could have a representative from the Union present and accompany them. Panuco was called and joined discussion and the subsequent walk-through of the plant.

About 10:30 a.m. as they were proceeding with the inspection, Philip Comerford approached the group and asked if he was to go along, inasmuch as he had been elected the month before as the union safety officer, a fact which was noted on the OSHA complaint. As will be discussed in more detail below, Grindley told Foreman Rudy Beretta to "get this man back to work," an order which Beretta testified Comerford ignored some

[3] The General Counsel's motion to correct the transcript is granted. Attached as Appendix B is the list of corrections. [Appendix B has been omitted from publication.]

[4] This charge was apparently dismissed or withdrawn and is not the basis for any of the complaints here.

four times during the course of 10 minutes. Comerford finally did return to work after being advised by Panuco that Panuco would continue to be the Union's representative during the inspection.

On December 14, after consultation with Korasac and Beretta, Grindley determined to discipline Comerford for his "insubordination" in being away from his assigned work station on December 13 and not immediately returning to it when told to do so by Beretta. Thus Comerford was given a 1-1/2-day suspension.

According to the testimony of Ford and Cook, about 1:15 p.m. that day, Ford announced that he was feeling ill, as had happened in the past, and he would go home for the rest of the day. Ford testified that he told Beretta he was sick and asked if he could leave; he also testified that he asked Korasac for permission to go home. Although Korasac was a witness for the Respondent, he did not deny Ford had asked permission to leave. While Beretta denied that Ford asked permission of him, he did testify that Korasac told him that Ford had said that he was sick and to write such on Ford's timecard. And Beretta did so.

The only real difference in the testimonial versions of Ford and Beretta is whether Ford in fact talked to Beretta or just talked to Korasac who then told Beretta that Ford went home sick. In any event, it is clear that Ford was given permission to leave work on the afternoon of December 14 due to illness.

Thus, Ford punched out at 1:31 p.m. on December 14. Thereafter, from 1:32 until 1:52, 26 other employees punched out and finally Panuco left at 2:38.

Faced with what the Union later conceded was an unlawful wildcat strike, the Respondent suspended all the employees until January 2, 1979. Then Grindley was contacted by William G. Lincoln, the subdistrict director for the Union, concerning getting the men back to work. Grindley, Lincoln, and officers of the Union along with the Respondent's president, David Smart, met on December 18. During the course of this discussion, the Union admitted that the strike was unlawful but contended that the Respondent ought to put the men back to work, then they could take their respective positions with regard to Comerford and Ford, Grindley having suggested that Ford resign or be kicked out of the Union, which the Union declined to do.

The Company did agree to reinstate all the employees the next day but determined at the time to discharge Ford because, according to Grindley, he had caused the wildcat strike. Grindley said he had six employees who would so testify.

On or about January 29, Ford circulated a petition which stated, in effect, that the signatories certified that Ford did not influence them to walk out or participate in the wildcat strike on December 14. This was signed by 24 of the production employees. And, it was offered into evidence during Ford's unemployment compensation hearing held on the morning of March 6.

Following the return to work of those employees who participated in Ford's unemployment compensation hearing on March 6, Floyd Hamilton made a statement to the effect that if Ford did not return his tools (Hamilton's tools having been stolen sometime in late December along with tools of some other employees) he would tell management that Ford in fact had caused the wildcat strike. After making this statement, Hamilton overheard two employees, whom he identified as Frank Smith and John Sumner, say something to the effect that if Hamilton spoke against Ford he would wind up in "little pieces." Hamilton then ran to Grindley's office and in an agitated manner stated that he was being threatened with being cut up in little pieces.

Grindley testified that he told Hamilton to identify the individuals who were making these threats and he would discharge them. Hamilton declined to do so, saying that he did not need Grindley's help. From then throughout the rest of the day there were conversations between Hamilton and Grindley and between Hamilton and other employees concerning this matter.

Then about 4 p.m., at the end of the shift, Sumner approached Hamilton. According to Hamilton, Sumner told him that had he said anything identifying Sumner he had better not walk in the street, or words to that effect. This, according to Hamilton, precipitated him going once again to Grindley and pointing out that Sumner was the one who had made the threats. Grindley went to Sumner and told him that he was being fired for having threatened Hamilton. Grindley testified that he generally respected Sumner's work and was reluctant to fire him, but he felt he had to do so. And he further said, "All I know is there were, I think he said, 29, I am not sure, 29 guys who signed a document that stated that Gerald Ford did not lead a wildcat strike. And he said not one of them would come forward and tell the truth. He said this will all come to a head the third of April."

B. *Analysis and Concluding Findings*

1. The discharge of Gerald W. Ford

The record here clearly establishes that, shortly after becoming a union member in August 1978, Ford was appointed to be an officer in the Union and immediately thereafter began taking an active role in union affairs, particularly including filing grievances for what he perceived to be contract violations on the part of the Company. Ford also filed an unfair labor practice charge in October as well as a complaint with OSHA, which resulted in an OSHA inspection on December 13.

While there is no showing of general union animus on the part of the Respondent, the record abounds with evidence that Grindley harbored animus toward Ford because of his filing grievances, as well as charges with the Board and OSHA. Indeed, Grindley admits that, for some 4 weeks prior to the wildcat strike on December 14, he had considered discharging Ford because of these acts—"during improperly filed grievances." And in one of exchanges of correspondence between Grindley and Ford, Grindley invited Ford to resign.

But the Respondent contends that Ford's activity in October and November did not play a part in his discharge—that he was discharged solely because the Respondent believed he led the wildcat strike.[5]

[5] It appears that the strike was caused by the Respondent's suspending Comerford. In view of my conclusion, *infra*, that the Respondent violat-

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There is little question that Ford's prestrike activity was a substantial source of annoyance to Grindley, to the point that he actually considered discharging Ford because of it. That Ford's conduct, irrespective of its characterization by Grindley, was protected activity is clear. He was a union officer filing grievances relating to the contract. Even if they were factually erroneous, a matter which need not be decided, to file grievances, even a lot of grievances, clearly is activity protected by Section 7 of the Act. E.g., *Farmers Union Cooperative Marketing Assn.*, 145 NLRB 1 (1963). Equally protected is filing a charge with the Board as well as filing a complaint with OSHA relating to health and safety in the plant. E.g., *G. V. R. Inc.*, 201 NLRB 147 (1973). Thus to the extent that Grindley was motivated by Ford's activity in October and November the discharge was violative of Section 8(a)(1), (3), and (4). *Professional Ambulance Service, Inc.*, 232 NLRB 1141 (1977).

At an October or November meeting between management and the Union, Grindley referred to Ford as the one starting all the "trouble." Grindley stated on December 13 to the OSHA inspectors that Ford was a "troublemaker." And following his discharge, Ford talked to Korasac who told him "you are fired for being a troublemaker," a statement not denied by Korasac.

While Korasac may have been referring to the Company's feeling that Ford initiated the wildcat strike, in view of the fact that "trouble" and "troublemaker" were words used to describe Ford prior to the strike, I conclude that Korasac also included the protected activity outlined above.

Given Ford's substantial activity in October and November, and the animus it generated, some of which is admitted to by Grindley, and the statement by Korasac following Ford's discharge, I conclude that in significant part the Company was motivated by Ford's protected activity.

Furthermore I do not credit Grindley that this activity was not a factor. I base this not only on Grindley's generally negative demeanor during the course of the hearing but also on the documentary evidence which shows Grindley's substantial animus toward Ford as a result of this activity. It strains credulity to believe that, given Grindley's animus, such would not have been taken into consideration by him in reaching the decision to discharge Ford following the wildcat strike.

However, inasmuch as Grindley did not in fact discharge Ford prior to the wildcat strike, although having contemplated it, it is more reasonable than not to infer that but for the wildcat strike Ford would not have been discharged when he was. In short, the wildcat strike was also a significant factor in the Respondent's determination to discharge Ford. I believe from this record that in fact the Respondent was motivated both by Ford's previous protected activity as well as its belief that he led the wildcat strike.

Further, I believe that, if Ford did not in fact lead the strike on December 14, the surrounding circumstances gave the Respondent ample reason to believe he did. The Respondent's belief in this regard was certainly not unreasonable.

Basically I do not credit Ford's version that he innocently left work sick on December 14 and that the others engaged in the wildcat strike without any input from him. It is undenied that Ford told Korasac that he was going to go home sick and this was in fact written on his timecard. It also is the testimony of both Ford and Cook that Ford told Cook shortly after 1 o'clock that he was sick and was going to go home. However, if this and only this happened, then it does not seem reasonable that Cook would have clocked out 1 minute after Ford. Had Ford told Cook simply that he was going to go home sick without this also being some kind of a signal, it does not seem reasonable that Cook would have followed him. To credit Ford would require concluding that Cook, on his own, decided to lead the walkout.

In addition is the testimony of Theodore Malloy and Donny Gurley, both of whom testified that a few minutes before 1:30 Ford told them that they were going to strike. While Ford has a stake in the outcome of this matter neither Malloy nor Gurley does. Further, I found their testimony generally straightforward and their demeanor credible. Thus I credit them over Ford.

Finally that Ford, who for some 2 or 3 months had acted as a leader among the men, would initiate a wildcat strike seems reasonable. I therefore discredit Ford's denial that he sought employees to join him in a wildcat strike. I conclude that he in fact did lead the strike. I further discredit Ford's testimony on rebuttal examination that upon hearing employees discuss the possibility of striking on December 13 he told them not to do so until he had had a chance the next day to discuss the Comerford matter with management.

While it appears that neither Malloy nor Gurley told the Respondent that Ford had contacted them until after Ford had been discharged, nevertheless at the time of his discharge there was reason to believe that Ford had led the strike. He was a leader among the men with regard to labor matters. He was the first one to clock out, followed shortly by the remaining employees. Thus I believe that Grindley could reasonably conclude that Ford had led the wildcat strike.

The Respondent is clearly permitted to discipline anyone involved in an unlawful strike; and certainly could have discharged the individual it perceived to be the leader while reinstating the others. *Precision Castings Company, Division of Aurora Corporation, a wholly owned subsidiary of Allied Products Corporation*, 233 NLRB 183 (1977). However, the Respondent could not rely on Ford's strike activity to justify discharging him for filing grievances under the contract and complaints with government agencies. *Gould Corporation*, 237 NLRB 881 (1978) (Member Truesdale dissenting from the 8(a)(3)

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ed the Act in suspending Comerford for his having engaged in protected activity, the strike was arguably an unfair labor practice strike and, if so, probably not a breach of contract. See *Mastro Plastics Corp. and French-American Reeds Manufacturing Co., Inc. v. N.L.R.B.*, 350 U.S. 270 (1956). However, since this matter was litigated on the premise that the strike was an unlawful breach of contract, and because finding it to be an unfair labor practice strike would not alter the remedy herein, in view of my conclusion that the discharge of Ford was motivated in part by his having engaged in protected activity, I will treat the strike as having been unprotected activity.

finding but concurring that the discharge violated Section 8(a)(1); Member Penello dissenting).

This, as *Gould*, is the rare duel-motive case where but for the unprotected activity the employee would not have been discharged, but nevertheless his discharge was predicated upon his having previously engaged in protected activity. The Board has long held that where a discharge is motivated at least in part by antiunion considerations then the discharge is violative of Section 8(a)(3). E.g., *Wood Transformers, Inc.*, 226 NLRB 1112, 1116 (1976); *Chrysler Corporation, Dodge Truck Plant*, 232 NLRB 466 (1977).[6]

I therefore conclude that Ford in fact led the wildcat strike on December 14, that such was the reasonable conclusion of the Respondent, and that this fact was a substantial consideration in the Respondent's determination to discharge him. I also conclude, however, that Ford would not have been discharged but for his prior protected activity including the filing of grievances and the filing of a charge with the Board and a complaint with OSHA. The Respondent in discharging Ford violated Section 8(a)(1), (3), and (4) of the Act.

2. The suspension of Philip Comerford

The Respondent contends that there was a safety committee consisting of Grindley and Panuco, the Union's president, and that it was without knowledge that Comerford had anything to do with the safety committee or being the union safety officer. However, at least from the time the OSHA complaint was served upon Grindley, Grindley was on notice that Comerford had been designated by the Union as the "safety officer." Such was stated on the complaint.[7]

Although there are some differences in emphasis, both sides attempting to characterize Comerford's actions in the light most favorable to their particular position, there is no real dispute concerning what happened on the morning of December 13. After the OSHA inspection started, Comerford learned of it and, inasmuch as he was the safety officer, he sought out the inspection team to see if he was supposed to participate. To do this, he had to leave his work station. When he approached the group, he was told by Beretta, on instructions from Grindley, to go back to work. Comerford ignored this order by Beretta and proceeded to ask if his presence during the inspection tour was needed. When he was told no, he did in fact return to work.

All this took no more than a few minutes and while it might be characterized by Grindley as insubordination, to some extent anytime an employee questions management he is insubordinate.

But in the context of protected activity, as I find participation in the OSHA inspection to be, such "insubordination" cannot justify disciplinary action.

The Respondent may very well have been justified in withholding pay for the few minutes that Comerford was away from his work station but to discipline him further for seeking to engage in protected activity is clearly a violation of the Act. Such is analogous to presenting a grievance to the company on working time. Only where the employer can show some overriding business interest, say if Comerford had left a dangerous or irrepairable situation, could the discipline not be a violation of the Act. See, e.g., *N.L.R.B.* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240 (1939); *Plastilite Corporation*, 153 NLRB 180 (1965).[8]

I therefore conclude that Comerford was disciplined because he sought to determine whether or not he was to participate in the OSHA inspection and that, in disciplining him for this, the Respondent violated Section 8(a)(1) and (3) of the Act.

3. The discharge of John E. Sumner, Jr.

Based on the generally credible testimony of Hamilton, excitable though it may have been, I conclude that in fact on March 6, after some employees returned from the unemployment compensation hearing, Sumner did make statements which Hamilton took to be threats to him. Whether the threats were as substantial as Hamilton testified really need not be decided. I conclude that Hamilton in fact went to Grindley stating that he had been threatened, and that Grindley could reasonably believe him.

This is not a case where an employee engaged in protected activity threatens a coworker, in which the issue is whether the employee loses "the protective mantle of the Act." Nor is this a situation where the discharge grew out of protected activity then engaged in by Sumner, in which case motive is not dispositive, the issue being whether the threat occurred. *N.L.R.B.* v. *Burnup & Sims, Inc.*, 379 U.S. 21 (1964). Rather, the issue here is whether Sumner's threat was the real reason Grindley discharged him. If so, then even if the threat could be deemed insubstantial the discharge is not unlawful.

An employer does not violate the Act by discharging an employee for a bad reason or even no reason. Irrationally is not an unfair labor practice. However, where the reason advanced for the discharge is not rational then that fact may be considered to infer that the true motive lies elsewhere. *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F.2d 426 (9th Cir. 1966).

So here the nature of Sumner's threat as recounted to Grindley by Hamilton must be viewed not in terms of whether such would legally justify the discharge of one engaged in protected activity; but, rather, whether absent the overall protected activity here, Grindley would have discharged Sumner.

I conclude that Grindley's discharge of Sumner was motivated by the ongoing union activity of the employees. The threat was seized upon as an excuse for the discharge. While I believe that Grindley would not have

[6] *Liberty Mutual Insurance Co.* v. *N.L.R.B.*, 592 F.2d 595 (1st Cir. 1979), relied on by the Respondent, is not controlling.

[7] On the complaint, under Ford's signature, title, and address: "Note Phil Comerford is our Safety Officer but he is in England." Presumably at the time the complaint was filed Comerford was in England. He was working on December 13.

[8] There is testimony and argument concerning whether Comerford "lied" to the OSHA inspectors about the type of respirator furnished him when painting as well as the fact that Comerford was ordered to shave his beard. Neither of these matters, however, had anything to do with his suspension and were not independently alleged to be unfair labor practices. They are, therefore, not further considered, and are mentioned only because there is argument and testimony concerning them.

discharged Sumner absent Hamilton's accusation, I also believe that, absent the union activity engaged in by virtually all the employees, Grindley would not have discharged a competent employee on the evidence then before him. Thus I conclude that the ongoing union activity was a direct and substantial cause of Grindley's act.

Although Ford was Grindley's principal protagonist, substantially all the bargaining unit was involved. Thus on December 14 there were 29 employees in the bargaining unit, 27 of whom walked out within a few minutes of Ford. Twenty had signed a document in November described by Grindley as "a memorandum by Gerald Ford to all union members of United Steelworkers, Local 1963, stating a lie." Twenty-four signed the January 29 document by which they certified that Ford had not influenced them to walk out. This was offered into evidence at Ford's unemployment compensation hearing on March 6, and characterized by Grindley as a "lie."

From at least December 18 on, the gravamen of this dispute involved Grindley's contention that Ford had instigated an unlawful strike. Ford's defense included having employees sign the January 29 document. March 6 was the first proceeding in which Ford's discharge was litigated. Both by signing the "certificate" and being present at the March 6 hearing Sumner aligned himself with Ford and against Grindley.

It was this act of aligning with Ford which was the true reason Grindley discharged Sumner on March 6, after having been given the excuse to do so by Hamilton. Indeed after he was discharged, Sumner asked Grindley why and was told, "this will all come to a head the third of April [the then scheduled hearing date for the unfair labor practice complaints involving Ford and Comerford]." While Grindley may very well have believed that he was right and the employees, including Sumner, were wrong in their defense of Ford, such clearly does not justify his discharge of Sumner. As noted above, there is ample evidence that Ford in fact instigated the strike. Without more, however, such does not prove that Sumner's act in signing the "certificate" or attending the hearing was not protected. It may well be that Ford did not influence Sumner. And there is no evidence he did.

Clearly for employees to defend the discharge of a fellow employee is concerted activity protected by Section 7, and it is this defense which motivated Grindley to discharge Sumner. Since such also related to his membership and activity through the Union, the discharge violated Section 8(a)(3) as well as Section 8(a)(1).

4. The alleged threat

The only allegation of an unlawful threat appears in the complaint in Case 17-CA-8668 relating to Ford. It is alleged that on November 9, 1978, Grindley threatened an employee (presumably Ford) with discharge for having filed a grievance and having engaged in union and other protected activity.

I have not been referred to any testimonial evidence to support this allegation, nor does my review of the transcript disclose any conversations on or about November 9 between Ford and Grindley in which Grindley made such a threat. As noted above, Grindley certainly harbored animus toward Ford because he had filed a number of grievances. And Ford in fact filed grievances on November 9. These facts, however, are insufficient to support finding the violation alleged. Accordingly, I shall recommend that paragraphs 5(a) and 5(b) of the complaint in Case 17-CA-8668 be dismissed.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent, set forth above, occurring in connection with its operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having concluded that the Respondent has engaged in certain unfair labor practices, I will recommend that it cease and desist therefrom and take certain affirmative action including offering Gerald W. Ford and John E. Sumner, Jr., reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions of employment, without prejudice to their seniority or other rights and privileges, and make them and Philip Comerford whole for any losses they may have suffered as a result of the discrimination against them in accordance with the formula set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[9]

Upon the foregoing findings of fact, conclusions of law, the entire record in this matter, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[10]

The Respondent, American Steel Works, Kansas City, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending, discharging, or otherwise discriminating against employees because of their interest in or activity on behalf of United Steelworkers of America Local Union No. 1963.

(b) Suspending, discharging, or otherwise discriminating against employees because they engage in concerted activity protected by Section 7 of the Act.

(c) Discharging or otherwise discriminating against employees because they filed charges with the National Labor Relations Board.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[9] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[10] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

2. Take the following affirmative action deemed necessary to effectuate the policies of the Act:

(a) Offer Gerald W. Ford and John E. Sumner, Jr., immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to other substantially equivalent positions of employment and make them amd Philip Comerford whole for any losses they may have suffered as a result of the discrimination against them pursuant to the provisions set forth in The Remedy section above.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Kansas City, Missouri, facility the attached notice marked "Appendix A."[11] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

The allegations in paragraphs 5(a) and 5(b) of Case 17-CA-8668 are dismissed.

[11] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."